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IN THE

Supreme Court of the United States

October Term, 1965

No. 846

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

Estate of HERMAN BORAX, Deceased,
HERMINE H. BORAX, ET AL., Executors,
Respondents.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

HAROLD E. WONDSEL,
Respondent.

BRIEF FOR RESPONDENT WONDSEL IN OPPOSITION

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BRIEF FOR RESPONDENT WONDSEL IN OPPOSITION

This brief is submitted by respondent Wondsel in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit seeking a review of the judgment of that court in *Wondsel* v. *C. I. R.*, 350 F. 2d 339.

Statement of the Case

In 1927 respondent and May White Wondsel (hereinafter "May") were married in Yonkers, New York. In

1936 a written separation agreement was entered into by respondent and May which provided, *inter alia*, for (1) a $65 per week payment to May for maintenance and support, (2) a $5,000 life insurance policy to be maintained by respondent for the benefit of May and (3) that in the event of the entry of any judgment of decree of absolute divorce, the terms of the written separation agreement relative to the maintenance and support provisions should be incorporated therein.

On or about November 8, 1937 the Circuit Court of the Eleventh Judicial District of Florida issued a final decree divorcing respondent from May. After reciting that the court had jurisdiction of the parties and of the subject matter, the decree dissolved the marriage, provided for the payment of $65 per week by respondent to May and for the maintenance of an insurance policy in the sum of $5,000.

In May, 1939, approximately one and a half years after the Florida divorce from May, respondent married Virginia Wondsel (hereinafter "Virginia") in Greenwich, Connecticut. The parties lived in New York for approximately four years and then lived in New Jersey until their separation in February, 1946. At that time respondent agreed in writing to pay to Virginia $200 per month for her maintenance and support.

In February, 1941, on May's application the Supreme Court of the State of New York in the County of New York, upon the default of respondent, entered an order declaring that May was his lawful wife and that respondent's marriage to Virginia was null and void.

In July, 1946 the Circuit Court of the Eleventh Judicial District of Florida, after noting jurisdiction of the parties, granted a decree divorcing respondent from Virginia and approved the written property settlement agreement providing for the alimony payment of $200 per month.

In October, 1946 respondent married Joyce Wondsel (hereinafter "Joyce") in New Jersey, lived in that state for two years and thereafter in New York. This marriage was at the request of Joyce annulled by order of the Supreme Court in Westchester County, New York in July, 1961 on the ground that respondent had previously been declared by the New York Supreme Court to be married to May.

There was no issue of the marriages by respondent with May and Virginia. There is one issue of the marriage with Joyce.

Respondent paid to May during the taxable years 1957, 1958 and 1959 the sum of $80 per week for her maintenance and support. The sum of $65 per week was paid pursuant to the decree of divorce entered by the Florida court. The additional sum of $15 per week was paid by respondent to May commencing in 1947 pursuant to an oral agreement. Respondent has also paid to Virginia $200 per month during the taxable years 1957, 1958 and 1959 in accordance with the Florida decree. Both May and Virginia have paid the tax due on the income in each of the years indicated.

The Decision Below

In reversing the Tax Court, Judge Moore, speaking for a unanimous court, held that respondent could properly deduct the alimony payments made by him to May and Virginia pursuant to the Florida decrees and could properly file a joint return with Joyce and take a dependency exemption for her. The court affirmed the Tax Court's denial of the deduction of $15 per week paid to May under the 1949 oral agreement (Pet./Cert., p. 48).

Reasons for Denying the Writ

On page 8 of his petition the Commissioner notes that the New York Supreme Court twice held the respondent-husband's *ex parte* Florida divorce from May (his first wife) invalid and he urges that it was error for the court below to require the Commissioner to regard respondent's *ex parte* divorce "as valid and treat respondent as if he were legally married to Joyce (his third wife)." (Pet./Cert., p. 8). In a similar vein the Commissioner points out that "the State where the parties are domiciled has an abiding and important interest in regulating their marital affairs; consequently, questions of marital status have traditionally been governed by the law of the State where the parties are domiciled" (Pet./Cert., p. 9).

Petitioner has misread the import of *Borax and Wondsel.* They do not require the Commissioner to regard the *ex parte* divorces as valid and to treat Wondsel as if he were legally married to his third wife. All that the Commissioner need do under these decisions is determine that (1) the alimony payments were made pursuant to a "decree of divorce" (§ 71(a)(1), I. R. C., 1954) and (2) that such decree has not been revoked by the granting jurisdiction. The Commissioner need not pass at all on the validity of the *ex parte* divorces; he must only ascertain the existence of a state decree of divorce.

Similarly, the decisions below do not impugn the right of a state to determine the marital status of the parties. The issue herein does not involve the role of a state in fixing the marriage relationship. *Borax* and *Wondsel* decide only a question of taxability of income. "What is income is controlled by Federal law." *Daine* v. *C.I.R.,* 168 F. 2d 449 (C. A. 2, 1948). Tax consequences are not to be resolved by decisions of a state court which bind parties in settlement of legal rights between themselves. *Drake* v. *U. S.,* 191 F. S. 84 (U. S. D. C., S. D. N. Y. 1961).

Based on the foregoing, the *Sutton, Sherrer* and *Coe* cases and the two *Williams* cases, cited by petitioner on pages 8 and 9 of his petition, are inapposite. They dealt only with the extent to which one state must give full faith and credit to a decision of a sister state on the issue of marital status and did not involve interpretations of federal income tax laws. In our case the issue is not one of full faith and credit between states. Rather, the question is whether for tax purposes an out of state divorce decree is recognizable under the federal tax statute, § 71, I.R.C. 1954. The holding of the New York court as to marital status remains unimpaired by the decision herein.

Nor may it properly be maintained that the Florida decrees of divorce obtained by respondent Wondsel must be considered (in the words of Judge Friendly, dissenting below), as the Commissioner urges, as a "piece of paper which has been drained of all legal vitality and [which] no court in the land may lawfully respect in a suit between the parties most concerned" (Pet./Cert., p. 10). As the court in both *Borax* and *Wondsel* points out (Pet./Cert., App. A, p. 23; App. B, p. 47) in citing *Colby* v. *Colby,* 78 Nev. 150, 369 P. 2d 1019, cert. den., 371 U. S. 888 (1962) it is not incumbent upon Florida to recognize a New York decree nullifying an *ex parte* Florida divorce. See also: concurring opinion of Murphy, J. (p. 239) and dissenting opinion of Rutledge, J. (p. 244, fn. 2; p. 249, fn. 7) in *Williams* v. *North Carolina,* 325 U. S. 226 (1945). Moreover, the suit herein is not "between the parties most concerned".

Indeed, the likelihood is that May, the first wife of Wondsel, would be unable to convince a Florida court to give full faith and credit to the New York decree holding the Florida decree null and void. Wondsel obtained his Florida *ex parte* decree against May in 1937 upon compliance with the procedural requirements of Florida law with respect to notice. May could reasonably anticipate that

Wondsel and third parties would rely on such a decree, which Wondsel did when he married Virginia in May, 1939, one and a half years after the Florida divorce. It was not until February, 1941, however, more than three years after the Florida decree, that May saw fit to obtain the New York judgment declaring the Florida decree void. On similar facts Florida has held that it would not set aside a foreign decree of divorce when the wife chose to "sit by idly, silently and in an attitude of acquiescence until she became under all circumstances forever barred by laches and equitable estoppel from questioning the validity of the decree of divorce insofar as it terminated the marital status." *Pawley* v. *Pawley* (Fla.), 46 So. 2d 464, 473-474; 28 A. L. R. 2d 1358, reh. den. 47 So. 546, cert. den. 340 U. S. 886.

The Commissioner sets forth his administrative practice by way of a footnote (fn. 6) on page 11 of the petition. He advises that the Service is not "an arbiter of State domestic relations questions" and will, therefore, recognize an *ex parte* divorce and subsequent remarriage, unless a state court with competent jurisdiction holds it invalid. The problem resulting from this position by the Commissioner may be illustrated briefly by three hypothetical but, nevertheless, real situations.

In the first case, the husband does not return to New York after obtaining an *ex parte* decree of divorce. Since the New York court is unable to obtain personal jurisdiction over him, it could not declare that the Florida decree was void. *Altholz* v. *Altholz,* 72 N. Y. S. 2d 143. Under the Commissioner's position the husband may then deduct alimony paid pursuant to that decree and file a joint return with the person he may thereafter marry. In the second case, the husband returns to New York but the wife takes no legal action to have her marital status determined. The Commissioner would allow the husband to take alimony

deductions and file a joint return. In the third case, the husband returns to New York and the wife obtains a judgment declaring the *ex parte* divorce invalid. The Commissioner would here disallow an alimony deduction by the husband or a joint return with the second wife.

Thus, under the Commissioner's position deductibility by the husband and taxability to the first wife will depend *either on where the husband chooses to live* after obtaining the out of state decree or whether the wife decides to seek an invalidation of such decree. The Commissioner's determination will, therefore, turn upon the action of the husband or wife. The result will necessarily be inconsistent tax treatment by the Commissioner to the parties involved, contrary to the intent of Congress. See *Commissioner* v. *Lester,* 366 U. S. 299, 301 (1961). It is precisely for this reason that the court in *Borax,* followed by the court in *Wondsel,* properly held that to promote certainty and uniformity—important goals of the federal tax scheme—the Florida decree should be recognized for tax purposes. As Judge Marshall noted in *Borax,* the "rule of validation" avoids unevenness and uncertainty:

> ". . . all those taxpayers who have obtained a divorce in a particular jurisdiction are treated the same, regardless of whether the spouse against whom the decree has been obtained is able to, and does, invoke the power of another jurisdiction to declare that divorce invalid." (Pet./Cert., App. A, p. 25.)

The Commissioner contends that the Ninth Circuit decision in *Gersten* v. *Commissioner,* 267 F. 2d 195, is in conflict with the decisions below "as to whether a taxpayer will be treated as married to a second spouse 'for tax purposes' where the earlier *ex parte* divorce from his first wife has been found invalid by a court with personal jurisdiction over the parties." (Pet./Cert., p. 13.) The Com-

missioner errs in asserting a conflict. As Judge Marshall clearly pointed out in his decision, which the Commissioner in a footnote recognizes (Pet./Cert., p. 13, fn. 9), *Gersten* did not involve a state court judgment declaring the second marriage invalid because of the invalidity of the foreign divorce from the first marriage. "Instead, it involved a state prohibition against remarrying that operated independently of whether the divorce obtained in a foreign jurisdiction was valid."[1] (Pet./Cert., App. A, p. 37.)

Nor is the Commissioner correct in maintaining (p. 15) that the opinions below in effect "overturn" the Congress' decision not to make the 1954 amendment to the Code applicable to pre-1954 agreements. While this amendment permits a husband to deduct alimony payments under a written separation agreement entered into after 1954 without a state divorce or separate maintenance decree, in *Borax* and *Wondsel* the 1954 amendment was not made applicable to pre-1954 agreements. The alimony deduction by Wondsel was based not on a separation agreement alone, but on "a decree of divorce" rendered by Florida. The statutory requirement of the Code that pre-1954 payments under an agreement be based upon a decree has been met rather than overturned.

While respondent maintains that the decision in *Borax* is entirely correct, certain distinctions between *Borax* and *Wondsel* in the facts would justify a denial of certiorari

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[1] In fact, there is no conflict with *Borax* or *Wondsel* in any circuit. The Third Circuit has previously reached a similar holding in *Feinberg* v. *Commissioner*, 198 F. 2d 260. Other courts have cited *Feinberg* with approval. See: *Holt* v. *C. I. R.*, 226 F. 2d 757 (C. A. 2, 1955); *McFadden* v. *C. I. R.*, 250 F. 2d 545 (C. A. 2, 1957); *Hollander* v. *C. I. R.*, 248 F. 2d 523 (C. A. 9, 1957); *Stewart* v. *Rothensies, et al.*, 114 F. S. 497 (U. S. D. C., E. D., Pa., 1953); *Drake* v. *U. S.*, 191 F. S. 84 (U. S. D. C., S. D. N. Y., 1961). The Office of General Counsel, I. R. S. likewise ruled in favor of deductibility by the husband. See: G. C. M. 25250, 1947.

in *Wondsel*, even if this Court should determine that *Borax* should be reviewed. These distinctions are:

a. In *Wondsel* the first and second wives have paid the taxes for the years in question. In *Borax* the wife has not paid such taxes. Since the taxes have already been paid by those who received and enjoyed the income, which is consistent with the Congressional purpose (*McFadden* v. *C. I. R.*, 250 F. 2d 545 (C. A. 2d, 1957), it is inequitable for the Commissioner to insist on two taxes on the same income.

b. While in both cases the divorce decrees were uncontested by the wife in the granting state, in *Borax* the husband and wife contested in New York the validity of the out of state divorce decree. In *Wondsel* the husband did not contest the New York declaratory judgment or annulment proceeding holding the Florida divorce invalid. For federal tax purposes there is no cogent reason why preference must be given to the uncontested New York judgments over the uncontested Florida divorce decree. If the Commissioner must choose between the decrees of the two states,[2] then the balance weights in favor of recognizing the Florida divorce decree, since such recognition precludes inconsistent tax treatment and the paying of the tax by one who does not enjoy the income.

Conclusion

The decisions below do not involve important questions of federal law. Judge Friendly, the only dissenter, notes that civilization will not come to an end whichever way the case is decided. (Pet./Cert., App. A, p. 38.) Even so, *Borax* and *Wondsel* are eminently sound. They are in accord with the Congressional policy of promoting uni-

[2] Such a choice is not required, since neither the court below or respondent herein is questioning the right of the state of domicile to determine the marital status of its residents. See *supra*, pp. 4-5.

formity in tax administration and placing the tax burden on the person enjoying the income. Further, no other circuit is in conflict; indeed, where the question has arisen, the courts and the I.R.S. have approved the rule of validation adopted below. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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